No. 18-96

IN THE

Supreme Court of the United States

TENNESSEE WINE AND SPIRITS RETAILERS ASSOCIATION,

Petitioner,

v.

CLAYTON BYRD, *ET AL.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF MAJOR BRANDS, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS*[1]

Major Brands, Incorporated ("Major Brands") is a Missouri corporation in good standing and is a Missouri-resident wholesaler of wine, spirits, and beer in the State of Missouri. As a Missouri based and operated wholesaler, Major Brands is licensed by the Missouri Division of Alcohol and Tobacco Control to engage in the wholesale distribution of wine and liquor.

Major Brands operates under Missouri's three-tier liquor distribution system, which includes a statute that limits the issuance of corporate wholesaler licenses to only "resident corporations." *See* Mo. Rev. Stat § 311.060. A "resident corporation" under the statute is a corporation incorporated under the laws of the State of Missouri whose officers, directors, and at least 60% of its shareholders are "qualified legal voters and taxpaying citizens of the county and municipality in which they reside and who shall have been bona fide residents of the state for a period of three years continuously immediately prior to the date of filing of application for a license." *Id.*

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part and no one other than the *amicus* and its counsel made a monetary contribution to fund the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2, counsel for *amicus curiae* states that Petitioner and Respondents have all entered blanket consents on the docket to the filing of *amicus curiae* briefs.

While the present case involves residency requirements at the retail tier, the Court's decision may likely impact residency requirements at the wholesale tier, as well. Accordingly, as a wholesaler operating within a State three-tier liquor distribution system that includes a three-year in-state residency requirement for licensure, Major Brands has a direct and compelling interest in ensuring that the validity of such residency requirements within a three-tier system are upheld and that the State-determined policies that this regulatory scheme is intended to promote and protect are not compromised.

SUMMARY OF ARGUMENT

In this litigation, Respondents challenge Tennessee's constitutionally established right to determine for itself the best way to regulate the distribution and sale of intoxicating liquors within Tennessee's borders. Specifically, Respondents contend that Tennessee lacks the ability to require that individuals, or in the case of a corporation, the officers, directors, and stockholders, desiring to sell liquor at retail within the State of Tennessee reside in Tennessee for two years before they are eligible for a license to sell liquor to Tennessee consumers. Respondents' challenge fails, and the decisions of the District Court and of the Court of Appeals should be overturned, because Tennessee's residency requirements are protected by the Twenty-first Amendment of the United States Constitution.

This Court, in *Granholm v. Heald*, 544 U.S. 460 (2005), already has considered and rejected the arguments raised by Respondents. In that case, consistent with prior prece-

dent, the Court unanimously expressed constitutional approval of three-tier distribution systems (such as Tennessee's) and concluded that the Twenty-first Amendment empowers a State to require that all liquor sold for use in the State be purchased from a licensed, in-state wholesaler and sold by a licensed, in-state retailer. Indeed, the majority in *Granholm* directly addressed and assuaged the States' concerns that an adverse decision in *Granholm* "would call into question the constitutionality of the three-tier system" and the residency requirements within such a system by stating that such a system is "unquestionably legitimate." *Id.* at 488–89. Accordingly, this Court already has decided, unanimously, that the Twenty-first Amendment protects State requirements that its liquor wholesalers and retailers be residents of the State.

The desirability of such residency requirements, moreover, is amply illustrated by Major Brands' experience as a licensed wholesaler operating within a residency requirement in the State of Missouri. Residency requirements ensure that individuals distributing and selling liquor within a State are accessible, accountable, and actively engaged in the enforcement of the State's regulations and public policies concerning the distribution of liquor.

This Court should reject Respondents' attempt to second-guess the considered judgment of the Tennessee General Assembly and should discard Respondents' misreading of the Twenty-first Amendment, *Granholm*, and other precedent. The judgment of the District Court and the

Sixth Circuit's decision affirming the same should be reversed.

ARGUMENT

I. TENNESSEE'S RESIDENCY REQUIREMENTS ARE PROTECTED BY THE TWENTY-FIRST AMENDMENT.

A. Under this Court's Decision in *Granholm v. Heald*, this Court Already Has Determined that Statutes Requiring that Wholesalers and Retailers Be "In-State" to Distribute and Sell Liquor, Respectively, Are Protected by the Twenty-First Amendment.

The Court should be under no illusion as to what Respondents are seeking in this litigation: Respondents directly challenge Tennessee's constitutional right to structure and regulate its system for the distribution and sale of intoxicating liquors within its borders as it sees fit. Specifically, Respondents argue, and the courts below incorrectly concluded, that the dormant Commerce Clause forbids States from excluding out-of-state retailers within a State-defined three-tier system of liquor distribution unless such discrimination satisfies some level of heightened scrutiny. The Supreme Court rejected precisely this argument in *Granholm*, however.

Section 2 of the Twenty-first Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The Supreme Court has ex-

plained that, "[g]iven the special protection afforded to state liquor control policies by the Twenty-first Amendment, they are supported by a strong presumption of validity and should not be set aside lightly." *North Dakota v. United States*, 495 U.S. 423, 433 (1990).

In *Granholm*, all nine members of the Court agreed that the Twenty-first Amendment grants States virtually plenary authority to structure three-tier liquor distribution systems as they see fit—including the authority to do so in a way that facially discriminates against out-of-state wholesalers and retailers. *See Granholm*, 544 U.S. at 489; *id.* at 518 (Thomas, J. dissenting). Under a three-tier system of distribution, a producer (the first tier) sells its wine or spirits to a licensed in-state wholesaler (the second tier), which ensures that all excise taxes have been paid and then delivers those products to a licensed in-state retailer (the third tier). *E.g., S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 802 (8th Cir. 2013). The specific question presented in *Granholm* involved the constitutionality of State laws that allowed in-state wine producers, but not out-of-state producers, to obtain licenses to sell their products directly to consumers. 544 U.S. at 465–66. Critically for present purposes, however, the States defending their laws argued that, if the Court held those laws unconstitutional, it would also cast doubt on the constitutionality of residency requirements applicable to licensed wholesalers and retailers—requirements that, by definition, discriminate against out-of-state interests. *Id.* at 488.

In holding that the Twenty-first Amendment does not authorize discrimination against out-of-state ***products***, the Court squarely addressed, and assuaged, the States' concern. The majority stated that three-tier systems are "unquestionably legitimate" under the Twenty-first Amendment. 544 U.S. at 488–89 (quoting ***North Dakota***, 495 U.S. at 432). The majority specifically distinguished between discrimination against out-of-state products, which the Twenty-first Amendment does not authorize, and decisions regarding "how to structure the liquor distribution system" in the State, over which "[t]he Twenty-first Amendment grants the States virtually complete control." ***Granholm***, 544 U.S. at 488 (quoting ***Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.***, 445 U.S. 97, 110 (1980)). The majority concluded that "[s]tate policies are protected under the Twenty-first Amendment" as long as "they treat liquor produced out of state the same as its domestic equivalent." ***Granholm***, 544 U.S. at 489. In so concluding, the majority emphasized that "[t]he Twenty-first Amendment . . . empowers [a State] to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler." ***Id.*** (quoting ***North Dakota***, 495 U.S. at 447 (Scalia, J., concurring in judgment)).

Unsurprisingly, the dissenting Justices agreed with the majority that the Twenty-first Amendment authorizes States to enact residency requirements as part of their three-tier distribution systems, even if those requirements necessarily discriminate against out-of-state interests. ***Granholm***, 544 U.S. at 518 (opinion of Thomas, J.). After surveying the history of the Twenty-first Amendment and

state regulations after its ratification, the dissent concluded that it is "understandable that the framers of the Twenty-first Amendment . . . would have wanted to free States to discriminate between in-state and out-of-state wholesalers and retailers." *Id.* at 524. When the majority and dissenting opinions in *Granholm* are considered together, therefore, it is clear that all nine members of the Court agreed that residency requirements of the type at issue here are authorized by the Twenty-first Amendment.

The Supreme Court's reasoning in *Granholm* defeats any argument that the Court's holding concerning discrimination against out-of-state *products* applies equally to discrimination within a State's three-tier distribution system. As explained above, the Court took care to clarify the implications of its holding in *Granholm* for the three-tier system and, in so doing, rejected precisely the approach that Respondents advance here. As other courts of appeals have correctly recognized in interpreting *Granholm*, the Court explicitly limited its holding to discrimination against out-of-state products, and permitted discrimination against out-of-state wholesalers and retailers to continue as part of the administration of three-tier systems. *See S. Wine & Spirits of Am., Inc.*, 731 F.3d at 809 (holding that Missouri's in-state wholesaler residency requirements are protected by the Twenty-first Amendment because the "three-tier system is 'unquestionably legitimate,' *Granholm*, 544 U.S. at 489, 125 S.Ct. 1885 (internal quotation omitted), and that system includes the 'licensed in-state wholesaler.'"); *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 190–91 (2d Cir. 2009) (concluding that a chal-

lenge to discrimination against out-of-state retailers was "directly foreclosed by the *Granholm* Court's express affirmation of the legality of the three-tier system"); *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006) (noting, in rejecting a challenge to the discriminatory regulation of alcohol retailers, that *Granholm* "repeatedly" distinguished between discrimination against out-of-state products and the residency requirements of three-tier systems).

The *Granholm* Court explained that, far from limiting States' options in requiring its wholesalers and retailers have an in-state presence, "[t]he Twenty-first Amendment grants the States virtually complete control over . . . how to structure the liquor distribution system." *Granholm*, 544 U.S. at 488 (quoting *Midcal*, 445 U.S. at 110). Accordingly, it is within Tennessee's power to ensure that its wholesalers and retailers have an in-state presence and, therefore, to define that in-state presence to ensure it is substantial and genuine to guarantee that the people actually in charge of the wholesaler and/or retailer will be accessible and accountable.

Indeed, there can be no doubt that the *Granholm* Court was well aware of residency requirements such as Tennessee's when it expressed its approval of in-state requirements for wholesalers and retailers. The dissenting opinion specifically catalogued state licensing schemes that discriminated by "requiring in-state residency or physical presence as a condition of obtaining licenses." 544 U.S. at 518 & n.6 (opinion of Thomas, J.).

Accordingly, the very argument Respondents make in this case, and which was adopted by the District Court and a majority of the Sixth Circuit, already has been considered and rejected by this Court. States' judgments regarding the inclusion and scope of residency requirements at the wholesale and retail level of their three-tier systems are protected by the Twenty-first Amendment. This Court should likewise reject Respondents' argument and reverse the District Court's judgment in Petitioner's favor.

B. Tennessee's Residency Requirements Are Related to Legitimate State Interests.

Although the Twenty-first Amendment and the precedent construing the same settles Tennessee's authority to enact the residency requirements at issue here without the need for policy arguments, the historical record presented in this Court's prior Twenty-first Amendment decisions and to this Court in other briefs illustrates why Tennessee's decision to demand true in-state presence of its retailers is an eminently reasonable one. Major Brands will not reiterate that record here, but Major Brands respectfully submits its experience as a wholesaler in Missouri to demonstrate that residency requirements ensure that individuals behind the distribution and sale of liquor are accessible, accountable, and actively engaged in the enforcement of the State's regulations and public policies concerning the distribution of liquor.

1. *The Experience of Major Brands Has Demonstrated the Benefits of Residency Requirements.*

Major Brands, a Missouri wholesaler of liquor, operates under a three-tier distribution system that has certain residency requirements for liquor wholesalers.[2] As one of the few wholesalers that distributes spirits, wine and beer statewide, Major Brands respectfully submits that an in-state presence is a core component of a three-tier system. Indeed, Justice Thomas explained in his dissenting opinion in *Granholm* that "the requirement that liquor pass through a licensed in-state wholesaler is a core component of the three-tier system." 544 U.S. at 518.

Missouri has expressly noted the purpose of its liquor control law:

> Alcohol is, by law, an age-restricted product that is regulated differently than other products. The provisions of this chapter establish vital state regulation of the sale and distribution of alcohol beverages in order to promote responsible consumption, combat illegal underage drinking, and achieve other important state policy goals such as maintaining an orderly marketplace composed

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[2] The arguments in this case implicate the constitutionality of Missouri's wholesaler residency requirements under the Twenty-first Amendment. The Eighth Circuit, in *S. Wine & Spirits of Am., Inc.*, 731 F.3d at 802, held that Missouri's wholesaler residency requirements are constitutional under the Twenty-first Amendment.

> of state-licensed alcohol producers, importers, distributors, and retailers.

Mo. Rev. Stat. § 311.015.

Wholesalers acquire wine and spirits from various suppliers around the globe; take ownership and possession of those products in Missouri; and deliver them to thousands of retailers for sale to, and consumption by, Missouri consumers. Given the role of wholesalers in the distribution process, it is unsurprising that the wholesale tier is subject to extensive oversight and control by the applicable regulator, the Division of Alcohol and Tobacco Control. For example, wholesalers must ensure that Missouri excise taxes have been paid on the alcohol they distribute; their products are subject to inspection regarding alcohol content, volume, and contaminants or other health and safety concerns; and their interactions with retailers are heavily regulated to ensure that only licensed retailers receive alcohol and that all retailers pay the same price for the same products.

Above and beyond the requirements imposed by law, personal interest and accountability play an important role in encouraging liquor distributors to achieve the statutory objectives of "promot[ing] responsible consumption, combat[ing] illegal underage drinking, and achiev[ing] other important state policy goals such as maintaining an orderly marketplace." Mo. Rev. Stat. § 311.015.

To begin with the obvious, Missouri's residency requirements ensure that the individuals controlling corpo-

rate wholesalers are citizens of the State. As Justice Thomas recognized in *Granholm*, "[p]resence ensures accountability." 544 U.S. at 523–24 (dissenting opinion) (internal quotation marks omitted). Presence specifically creates incentives for those individuals to be concerned with the public health and safety issues accompanying the distribution of liquor. In effect, Missouri's residency requirements ensure that individuals behind corporate wholesalers are distributing liquor in their own backyards—where they live, drive the streets, vote, and pay taxes. Individuals whose children drive the same streets as potential drunk drivers have powerful incentives not only to ensure that alcohol is distributed in a responsible manner, but also to support efforts to promote moderate consumption and to address the social ills of excessive consumption (such as alcoholism and homelessness). Out-of-state owners do not possess those incentives to nearly the same extent because, by virtue of their physical absence from the community, they are largely immune from personal reputational damage and the health and safety consequences of overconsumption.

Major Brands' experience demonstrates that the residency requirements ensure a high level of accountability and concern for the health and safety of Missouri's citizens. As residents of Missouri communities, Major Brands' owners and employees have taken leading roles in preventing underage alcohol use and curbing the toll of alcohol abuse, undertaking numerous charitable activities related thereto.

Major Brands also plays an active role in enforcing Missouri's regulations concerning the distribution of liquor. For example, Major Brands monitors retailers' compliance with state and local licensing laws and scans the market for unlicensed and "gray-market" products (*i.e.*, products that were shipped to another State but are illegally brought into Missouri for sale). Because Major Brands is in compliance with the residency requirements, moreover, it is easier for the under-funded Division of Alcohol and Tobacco Control to oversee its operations than it would be to oversee the operations of an out-of-state corporation that has not complied with the requirements.

Missouri's residency requirements reflect the Missouri General Assembly's considered judgment regarding how best to structure its liquor distribution system. As the experience of Major Brands demonstrates, those requirements concern legitimate state interests.

Similarly, Tennessee's residency requirements concern legitimate state interests. As stated by the Tennessee General Assembly:

> Because licenses granted under this section include the retail sale of liquor, spirits and high alcohol content beer which contain a higher alcohol content than those contained in wine or beer, as defined in § 57-5-101(b), it is in the interest of this state to maintain a higher degree of oversight, control and accountability for individuals involved in the ownership, management and control of licensed retail premises. For these reasons,

> it is in the best interest of the health, safety and welfare of this state to require all licensees to be residents of this state as provided herein and the commission is authorized and instructed to prescribe such inspection, reporting and educational programs as it shall deem necessary or appropriate to ensure that the laws, rules and regulations governing such licensees are observed.

Tenn. Code Ann. § 57-3-204(b)(2)(A), (3)(A)–(B), (3)(D), (4).

Missouri's residency requirements reflect the Missouri General Assembly's considered judgment regarding how best to structure its liquor distribution system. Likewise, Tennessee's residency requirements reflect the Tennessee General Assembly's considered judgment regarding how best to structure its liquor distribution system. The Twenty-first Amendment allows the States to make such judgments, free of interference, regarding their in-state liquor distribution systems. To find otherwise severely undermines the authority the people of the United States intended to give to States to structure and regulate the distribution and sale of liquor within their borders. The drafters of the Twenty-first Amendment did not intend for the explicit authority given to the States to regulate the sale and distribution of alcohol within their State to be swallowed up by the dormant Commerce Clause. Residency requirements directed at the distributors and sellers of liquor within a State, like those at issue here, are central to the power granted to the States and, therefore, must be

upheld. The decisions of the District Court and the Sixth Circuit should be reversed.

CONCLUSION

The judgment of the District Court and the decision of the Sixth Circuit should be reversed, and judgment should be entered in favor of Petitioner.

Respectfully submitted,

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